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IN THE

# Supreme Court of the United States

October Term, 1978

No. 78-952

RANDAL RUSH, et al.,

*Appellants,*

vs.

JEFFREY D. SAVCHUK,

*Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

# APPELLANTS' BRIEF

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*Savchuk v. Rush*, — Minn. —, 272 N.W.2d 888 (1978) (A. 51-68).

## GROUND UPON WHICH JURISDICTION IS INVOKED

In the foregoing opinions, the Minnesota Supreme Court held that 4 Minnesota Statutes, section 571.41, subdivision 2 (1971), as interpreted by that Court, is not repugnant to the United States Constitution, Amendment XIV, section 1—the Due Process Clause. Thus, jurisdiction of this Court is invoked pursuant to 28 United States Code, section 1257, subdivision 2.

Appellants asserted the constitutional issue at the inception of the litigation (A. 10-17). The motion of appellants to dismiss was denied by the trial court (A. 17-18), which order was thereafter affirmed by the Supreme Court of Minnesota (A. 29-39). Appeal was then taken to this Court, which vacated the Minnesota Supreme Court's judgment and remanded to the Minnesota Court (A. 52). Following remand, the Minnesota Supreme Court again held that Minnesota's exercise of jurisdiction herein did not violate the Due Process Clause (A. 52-61).

## STATUTE INVOLVED

4 Minnesota Statutes, § 571.41(2) (1971), provides:

"Garnishment shall be permitted before judgment in the following instances only:

(1) For the purpose of establishing quasi in rem jurisdiction



(a) when the defendant is a resident individual having departed from the state with intent to defraud his creditors, or to avoid service, or keeps himself concealed therein wtih like intent; or

(b) the defendant is a resident individual who has departed from the state, or cannot be found therein, or

(c) the defendant is a non-resident individual, or a foreign corporation, partnership or association.

(2) When the garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action."

## QUESTION PRESENTED

The Minnesota Court's construction of 4 Minn. Stat. § 571.41(2), in direct contravention of *Shaffer v. Heitner*, 433 U.S. 186 (1977), and of this Court's order, *Rush v. Savchuk*, 433 U.S. 902 (1977), grants to Minnesota courts quasi in rem jurisdiction over nonresident defendants who have absolutely no "minimum contacts" whatsoever with Minnesota in situations where the garnished "property" is not the subject of the litigation.

Thus, the question is: Does Minnesota's garnishment procedure pursuant to Minn. Stat. § 571.41(2), as interpreted by the Minnesota Supreme Court, offend the traditional XIVth Amendment due process standards of fairness and substantial justice enunciated in *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), which standards are expressly made applicable to quasi in

rem proceedings by *Shaffer v. Heitner,* 433 U.S. 186 (1977)?

## STATEMENT OF THE CASE

On January 13, 1972, Savchuk and Rush, both Indiana residents, were involved in an automobile accident in Elkhart, Indiana (A. 31). Savchuk was a passenger in the vehicle driven by Rush *(Id.)*. The vehicle was insured by State Farm pursuant to a standard automobile liability insurance policy which required State Farm to defend and indemnify Rush and further required Rush to cooperate in the defense of any suit against him (A. 15, 32, 25). The involved vehicle was registered in Indiana and insured in Indiana by a contract of insurance written and delivered in Indiana (A. 66). Indiana has a guest statute which precludes liability for damages to the injured guest unless the operator's conduct amounts to willful or wanton misconduct. (A. 58).

In June, 1973, Savchuk moved to Minnesota (A. 16, 31). In May, 1974, a prejudgment garnishment summons was served upon State Farm to attach its indebtedness to Rush (A. 2-3, 31). Disclosure was made by State Farm indicating no indebtedness (A. 4, 31). Thereafter, a supplemental complaint was served upon State Farm objecting to the disclosure and a summons and complaint seeking $125,000.00 in damages was served upon Rush in Indiana (A. 6-7, 31). The State Farm policy provided only $50,000.00 in coverage (A. 15).

Thereafter, appellants attacked the asserted quasi in rem jurisdiction on constitutional grounds in the District and Supreme Courts of Minnesota.



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## ARGUMENT

### I.

### Background: *Seider v. Roth*

The "constitutional history" of the instant case began with *Seider v. Roth*, 17 N.Y. 2d 111, 216 N.E. 2d 312 (1966), in which a New York resident, who was injured in a Vermont accident, sought to bring a quasi in rem action in New York against the alleged tortfeasor, a resident of Quebec, by attaching the Quebecois' liability insurance policy. At issue was a New York statute which permitted a plaintiff to attach a debt owed to the defendant to obtain quasi in rem jurisdiction over the defendant. The New York Court held that the policy constituted a debt (owed by the insurer to its insured) which was subject to attachment in New York because the insurer did business (i.e., was "present") in New York.

Shortly thereafter, *Seider* was directly attacked on due process grounds in *Simpson v. Loehmann*, 21 N. Y. 2d 990, 238 N.E. 2d 319 (1968), in which a majority of the New York Court held, pursuant to *Harris v. Balk*, 198 U.S. 215 (1905), that since a debt has a situs and may be attached in any state where the debtor is subject to in personam jurisdiction, no due process question exists. Thus, reasoned the Court, the fact that the non-resident's insurer is "present" in New York made the "debt" owed by the insurer to its insured constitutionally attachable in New York. The majority also noted that in assessing "fairness" pursuant to the due process clause, the fact that plaintiff was a resident of New York "looms large" (234 N.E 2d at 672). In the dissenting opinion, Judges Burke and Scileppi reasoned that the majority impermissibly stretched

*Harris v. Balk* because attachment of a contingent "debt" (such as the insurer's obligation to investigate and defend) cannot provide a basis for quasi in rem jurisdiction because the debt does not exist until it is adjudicated and the debt cannot be adjudicated until it is determined to exist within the forum; and the dissent prophetically suggested that attached property should provide a basis for quasi in rem jurisdiction only where there are such "minimum contacts" with the property that maintenance of the suit does not offend traditional notions of fair play and substantial justice (234 N.E. 2d at 678), citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

The next constitutional attack on *Seider* occurred in the federal courts. In *Minichiello v. Rosenberg*, 410 F. 2d 106, 117 (2d Cir. 1968), cert. denied, 396 U.S. 844 (1969), the Court of Appeals, in a panel opinion, determined that since the New York courts considered *Seider* as a "judicially created direct action statute" and since the U.S. Supreme Court would (the Court of Appeals "believed") sustain the validity of such a statute, *Seider* was constitutionally permissible. However, a careful reading of the majority opinions in both *Seider* and *Simpson* must lead to the conclusion that the New York court declined to bottom its determinations on an analogy to a direct action statute and, as stated above, held that *Harris v. Balk* provided the constitutional basis for *Seider*.

In its opinion, the Court of Appeals considered other constitutional problems which are created by *Seider*, including the most troublesome of all—the fact that other states might give collateral estoppel effect to a *Seider* judgment against a defendant in an in personam action against that defendant in such another state, and concluded:



> "To be sure it may be cold comfort to a non-resident defendant to have our assurance that if some state should be so misguided as to consider a New York Seider judgment as concluding him, he will be able to have this ruling overturned by the Supreme Court of the United States." (410 F. 2d 112).

On a rehearing in banc (410 F. 2d 117 [2d Cir. 1968]), a majority of the Court of Appeals was constrained to sustain *Seider* solely on the basis of *Harris v. Balk*. The dissent (like the dissent in *Simpson v. Loehmann, supra*) also reasoned that *Seider* stretched *Harris v. Balk* too far, and also prophetically questioned the continued vitality of *Harris v. Balk* as not being "attuned to the modern jurisdictional search to attain substantial justice by balancing interests". (410 F. 2d at 112).

Additionally. it is interesting to note that a majority of the *Minichiello* court judges joined the majority of the *Simpson v. Loehmann* court judges in urging a complete re-examination of *Seider* "to hasten the day of its overruling or its annulment by legislation". (See 234 N.E. 2d 672-73, 674-75; 410 F. 2d 119).

In 1976, the constitutional scene shifted from New York to Minnesota when the instant case was first presented to the Minnesota Supreme Court: *Savchuk v. Rush*, — Minn. ——, 245 N.W. 2d 624 (1976) (A. 29-46).[1] In its

[1]In the meantime, all states (but one) which considered the adoption of *Seider v. Roth* procedure, declined to do so: *Robinson v. O. F. Shearer & Sons, Inc.*, 429 F. 2d 83 (3rd Cir. 1970) (federal maritime law); *Grinnell v. Garrett*, 295 So.2d 496 (La. App. 1974); *State ex rel. Government Employees Ins. Co. v. Lasky*, 454 S. W. 2d 942 (Mo. App. 1970); *Johnson v. Farmers Alliance Mutual Ins. Co.*, 499 P. 2d 1387 (Okla. 1972); *Jardine v. Donnelly*, 413 Pa. 474, 198 A. 2d 513 (1964); *DeRentiis v. Lewis*, 106 R. I. 240, 258 A. 2d 464 (1969); *Howard v. Allen*, 254 S. C. 455, 176 S. E. 2d 127 (1970); *Housley v. Anaconda Co.*, 19 Utah 2d 124, 427 P. 2d 390 (1967). See also, *Tessier v. State Farm Mutual Ins. Co.*, 458 F. 2d 1299 (1st Cir. 1972); *Kirchman v. Mikula* 443 F. 2d 816 (5th Cir. 1971); *Sykes v. Beal*,

opinion, the Minnesota Court held that there was a threefold test for determining the constitutionaliy of Minnesota's garnishment statute:

> "(1) proper notice must be given to the defendant-insured affording him adequate opportunity to defend his property; (2) the defendant cannot be exposed to liability greater than the amount of his insurance policy; (3) the procedure may be utilized only by residents of the forum state". (A. 34-35; 245 N.W. 2d 628).

Additionally, the Court in *Savchuk I* reasoned that sufficient minimum contacts exist because (a) the insurer does business in Minnesota, and (b) the state has a legitimate interest in providing its residents with a forum (A. 37; 245 N.W. 2d at 629).

Then came this Court's decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977), and its order vacating the Minnesota Supreme Court's judgment in the instant case and remanding it to the Minnesota Court "for further consideration in light of" *Shaffer: Rush v. Savchuk*, 433 U.S. 902 (1977).[2]

Following *Shaffer*, a swarm of cases (as from an angry beehive) erupted in New York. Some New York state and federal courts determined that *Shaffer* overruled *Seider;* others that it did not.[3] Ultimately the question was again presented to the U.S. Court of Appeals: *O'Connor v. Lee-*

392 F. Supp. 1089 (D. Conn. 1975); *Ricker v. Lajoie*, 314 F. Supp. 401 (D. Vt. 1970). Subsequently, two more states have done the same: *Javorek v. Superior Court of Monterey County*, 131 Cal. Rptr. 768, 552 P. 2d 728 (1976); *Werner v. Werner*, 84 Wash. 2d 360, 526 P. 2d 370 (1974).

The one exception is New Hamshire which adopted *Seider* solely in retaliation to New York's use of *Seider* against New Hampshire residents. *Forbes v. Boynton*, 113 N. H. 617, 313 A. 2d 129 (1973).

A short bibliography of articles, notes and comments critical of *Seider v. Roth* appears at the end of this brief.



*Hy Paving Corp.*, 579 F. 2d 194 (2d Cir. 1978), cert. denied sub nom., *Lee-Hy Paving Corp. v. O'Connor*, — U.S. —, 47 U.S.L.W. 3386 (Dec. 4, 1978). In *O'Connor*, the Court departed from the *Harris v. Balk* basis which it had used to sustain *Seider*-type actions in *Minichiello v. Rosenberg*, 410 F. 2d 117 (2d Cir. 1968) (discussed above), and concluded that the *Seider v. Roth* procedure was really sui generis (579 F. 2d 202, n. 11). In arriving at this conclusion, the Court reasoned: (1) a judgment for plaintiff will deprive the defendant of nothing; (2) the insurance policy is not wholly unrelated to the litigation; (3) the insurer controls all aspects of the litigation; (4) the defendant is only a mere witness and has no more interest in the litigation than a "casual ejector"; (5) what is at stake is the payment by the insurer of plaintiff's damages; (6) the new bias of the courts is to permit the plaintiff to insist that the defendant come to him; (7) plaintiff's damage witnesses are readily available to him in his home state and, since a large proportion of *Seider* cases are settled, there is no particular interest in requiring the action to be brought in the accident state; and (8) the greater liberality of New York juries is not of constitutional magnitude. Thus,

[2]Ten days before *Shaffer*, New York decided that a nonresident could not use *Seider* to obtain jurisdiction in New York because the defendant's insurer's duty to defend, etc., was not of "sufficient substance to support quasi in rem jurisdiction". *Donawitz v. Danek*, 42 N. Y. 2d 138, 366 N. E. 2d 253 (1977). Concurring and dissenting opinions pointed out that an insurer's duty to defend, etc., could not become substantial or insubstantial depending on whether the attaching party was a resident or a nonresident; and concluded that a refusal to allow a nonresident to use the *Seider* procedure presented very substantial privileges and immunities and equal protection problems, and amounted to a state depriving nonresidents of a privilege of citizenship in violation of U. S. Const., Art. IV, §2. While these constitutional questions are not before the Court in the instant case, the fact that they exist is just one more reason why *Seider* is an unconstitutional doctrine.

[3]Some of these cases are summarized in *O'Connor v. Lee-Hy Paving Corp.*, 579 F. 2d 194, 197, n. 2 (2d Cir. 1978); and in *Savchuk v. Rush*, 272 N.W . 2d 888, 891 (Minn. 1978) (A. 57-58).

reasoned the Court, since the insurer in subject to in personam jurisdiction in New York, *Shaffer* is inapplicable.[4]

After reconsidering the matter in light of *Shaffer*, the Minnesota Court adhered to its earlier decision in the instant case, albeit on grounds far different from those adopted in *O'Connor v. Lee-Hy Paving Corp., supra: Savchuk v. Rush*, — Minn. —, 272 N.W. 2d 888 (1978) (A. 51-68). In *Savchuk II*, a majority of the Minnesota Court reasoned:

> 1. That the consequences of *Shaffer v. Heitner, supra*, are "not clear" (A. 56; 272 N.W. 2d 890-91);
>
> 2. That "Minnesota's legitimate interest in facilitating recoveries for resident plaintiffs not only requires provision of a local forum, but may override [sic] traditional choice of law analysis" (A. 58-59; 272 N.W. 2d 891-92);
>
> 3. "It cannot be said that Minnesota lacks such minimally-requisite contacts, ties or relations to those defending parties as to offend the requirements of due process" (A. 61; 272 N.W. 2d 893).

In addition, the majority ruled that in *Seider*-type cases, Minnesota courts would apply Minnesota substantive law. (A. 58; 272 N.W. 2d 891, n. 5).

The dissenting opinion of Mr. Justice Otis (in which two other Justices concurred) quite correctly pointed out that—

> "The inference to be drawn from this remand [by the United States Supreme Court] is not, in my opinion, that we are free to distinguish Shaffer and reinstate the judgment vacated by the Supreme Court. As

[4]In *O'Connor*, the Court of Appeals also determined that in *Seider v. Roth* actions, it was proper to apply New York substantive law rather than the substantive law of the place of the accident.



> I construe it, we are simply afforded an opportunity to revise our decision to conform to Shaffer on the assumption we would have reached a different conclusion had Shaffer been decided when we wrote Savchuk. Any other inference would lead to the unlikely conclusion that the Supreme Court was merely delegating to us its responsibility to resolve a difficult constitutional question.
>
> "Three specific rules recognized in Shaffer dispose of the jurisdictional issue here presented.
>
> "First. A forum state acquires no jurisdiction either in rem or in personam merely by the location in that state of property owned by defendant, unless such property is the subject of the litigation. Otherwise it is available only to satisfy a judgment. 433 U.S. 210-13, 97 S. Ct. 2583-84, 53 L. ed. 2d 701-03.
>
> "Second. In order to obtain either in rem or in personam jurisdiction the *defendant* must have certain minimum contacts with the forum state 'such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice" '. 433 U.S. 203, 97 S. Ct. 2580, 53 L. ed. 2d 697.
>
> "Third. It is the relationship among the defendant, the forum, and the litigation which is the basis for jurisdiction over a nonresident, not their relationship with the *plaintiff*. 433 U.S. 208-09, 97 S. Ct. 2582-83, 53 L. ed. 2d 700-01." (A. 61-62; 272 N. W. 2d 893; emphasis by the Court).

Four days after *Savchuk II*, the New York Court again determined the propriety of *Seider: Baden v. Staples*, 45 N.Y. 2d 889, 383 N.E. 2d 110 (1978). In *Baden*, the Court reasoned that since *Shaffer* did not repudiate *Seid-*

*er, Seider* satisfies the jurisdictional standards set forth in *Shaffer*. The Court also echoed the *O'Connor v. Lee-Hy Paving Corp., supra,* principle that since the dispute is between a New York plaintiff and an insurer doing business in New York, it is not injustice to adjudicate the matter in New York; and concluded "it is more important that the law be settled than it be settled 'correctly' ".

## II.

### Quasi in Rem Jurisdiction: Impact of *Shaffer v. Heitner*

As previously stated, the basic issue presented by the instant case is the constitutionality of the quasi in rem procedure utilized by appellee to gain jurisdiction over the nonresident defendant-appellant. However, because of the sui generis or hybrid characterizations of *Seider v. Roth,* a brief mention of those matters is also appropriate.

In the present case, a quasi in rem statute, 4 Minn. Stat., §571.41(2) (1971), was used to obtain quasi in rem jurisdiction. A nonresident's "debt" was garnished (attached) in Minnesota, and the Minnesota Supreme Court concluded that this procedure resulted in the acquisition of quasi in rem jurisdiction which did not violate due process.[5] In this regard, the Minnesota Court erred in declining to follow the teaching of *Shaffer v. Heitner,* 433 U.S. 189 (1977).

In *Shaffer,* this Court overruled a long line of precedent founded on *Pennoyer v. Neff,* 95 U.S. 714 (1877). *Pennoyer* had held that a state's authority to adjudicate is based on the state's power over persons *and property* located within its boundaries. *Pennoyer* was substantially

[5]In its opinion, the Minnesota Court referred to the matter as "this type of quasi in rem jurisdiction." (A. 61; 272 N.W.2d 893).



modified in *International Shoe v. Washington,* 326 U.S. 310 (1945), in which it was held that a state may assert in personam jurisdiction over a nonresident without violating the nonresident's due process rights if the nonresident has certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. This Court also held that the due process clause does not contemplate that a state may make binding a judgment in personam against an individual with whom "the state has no contacts, tie or relations." (326 U.S. at 319). Concerning *International Shoe,* this Court noted in *Shaffer* that in respect to in personam actions, "the relationship among the defendant, the forum and the litigation . . . became the central concern of the inquiry into personal jurisdiction" (433 U.S. at 204).

In *Shaffer* this Court was asked to extend its tripartite analysis of *International Shoe* to the determinations of due process standards required for the constitutional exercise of jurisdiction in actions in rem as well as in personam. This Court responded by holding—

> "The standard for determining whether an exercise of jurisdiction over the interests of persons [i.e., property rights] is consistent with the Due Process Clause is the minimum contacts standard elucidated in *International Shoe*" (433 U.S. at 207).

In the type of quasi in rem jurisdiction herein involved—where the "only role played by the property is to provide a basis for bringing the defendant into court", and where the "property which now serves as the basis for state court jurisdiction is completely unrelated to plaintiff's cause of action" (433 U.S. at 209)—this Court determined:

> "In such cases, if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible"(433 U. S. at 209).

The parallels between *Shaffer* and the instant case are cogent. Here, as in *Shaffer*, plaintiff seeks to apply what he concedes to be the "property" of defendant to satisfy a claim against defendant. Here, as in *Shaffer*, the garnished property is unrelated to plaintiff's claim against defendant. Here, as in *Shaffer*, there are absolutely no contacts between the defendant and the forum. It follows, in the language of *Shaffer*, that since a direct assertion of personal jurisdiction over defendant would violate the Constitution, Minnesota's indirect assertion is equally impermissible, and that Minnesota should only have jurisdiction to attach defendant's property

> ". . . as security for a judgment being sought *in a forum where the litigation can be maintained consistently with International Shoe.*" (433 U.S. at 210; emphasis supplied).

The foregoing analysis is fortified by an examination of the reasoning of the majority opinions of the Minnesota Supreme Court in the present case.

In *Savchuk v. Rush I*, the Court ruled that due process was satisfied because there was adequate out-of-state notice to defendant, liability in Minnesota was limited to the policy limits, and the procedure was limited to Minnesota plaintiffs (A. 34; 245 N.W.2d 629). The Court felt that there were sufficient minimum contacts with Minnesota because the insurer was "present" in Minnesota and Minnesota has an interest in providing its residents with a Minnesota forum (A. 37; 245 N.W. 2d 629).



Following this Court's decision in *Shaffer v. Heitner* and its vacation of the judgment in *Savchuk v. Rush I*, the Minnesota Court in *Savchuk v. Rush II* reiterated the above points (A 53; 272 N.W. 2d 889); characterized *Seider v. Roth* as a "hybrid" which "does not rest exclusively on *Harris v. Balk*." (A. 59; 272 N.W. 2d 892); and ruled that:

> "We view as relevant the relationship between the defending parties, the litigation, and the forum state. It cannot be said that Minnesota lacks such minimally requisite 'contacts, ties, or relations' to these defending parties as to offend the requirements of due process. In view of our consistent policies of providing a forum to residents of this state and extending our jurisdiction to the maximum limits consistent with due process, we decline to reverse our prior decision." (A. 61; 272 N.W. 2d 893).

In essence, the Minnesota Court, by its reference to "defending parties" (i.e., the defendant and his insurer),[6] has departed from the *Shaffer v. Heitner* mandate that the central concern be the relationship among the defendant, the forum and the litigation; and has substituted a new "central concern"—the relationship among the *plaintiff*, the forum and the *insurer*.

Thus, Minnesota (like the New York courts) has determined that plaintiff's contacts with the forum are paramount— if not controlling—in satisfying due process.[7]

---

[6]The *insurer*, of course, is not a defendant—it merely has a contractual obligation to pay the fees charged by the attorney selected to represent the defendant.

[7]In addition, the Minnesota Court held that plaintiff's residence in Minnesota is *essential* to due process, reasoning that if plaintiff were a nonresident, the garnishment procedure would be unconstitutional (A. 35; 245 N.W.2d 628. A. 53; 272 N.W.2d 889). How can a procedure be rendered constitutional by restricting the use of that procedure to residents when the state may not constitutionally deprive nonresidents from the use of the same procedure? See note 2, *supra*.

While the Minnesota courts may have a concern to provide a Minnesota resident (however transitory or temporary that resident may be) with a Minnesota forum, that concern does not come close to satisfying the fairness requirement of due process. The question is not due process as to a plaintiff who certainly has a valid forum available to him following the accrual of his cause of action.[8] The question is due process as to the "defending parties"—can they be fairly hailed before a forum as to which they have no contacts vis-a-vis the litigation? Furthermore, the Minnesota court's decision to extend its jurisdiction to the constitutional maximum does not establish due process; it merely begs the question of what are the applicable due process limits. Thus, the relationship between the plaintiff and the forum is not paramount; it is immaterial.

What about the contacts between the forum and the "defending parties"? The defendant has absolutely no contacts with Minnesota. Thus, as Chief Justice Sheran recognized in *Savchuk I*, personal jurisdiction over the defendant in the present case could not be constitutionally justified (A. 16; 245 N.W.2d 629). See *Hanson v. Denckla*, 357 U.S. 235 (1958).

If the insurer be deemed a defending party, its only direct contact with Minnesota is that it, fortuitously, does business there. It is "present" and thus subject to in personam jurisdiction. But the "attached" insurance policy is an Indiana contract written and issued to an Indianan in Indiana. There is no dispute among the parties as to the existence or meaning of the policy requiring judicial

[8]In the instant case, plaintiff could have sued the defendant in Indiana for the one and one-half years that plaintiff remained an Indiana resident, and could have sued the defendant in Indiana following plaintiff's emigration to Minnesota until the Indiana statute of limitation had run.



construction. Thus, the policy is not the subject matter of the litigation. Instead, the policy merely provides contingent obligations to the Indiana insured. the defendant, which (per the overruled *Harris v. Balk* doctrine) are fictionally "present" in Minnesota and thus (according to the Minnesota Court) subject to a fictional seizure there. The insurer's "presence" in Minnesota is wholly unrelated to the contract it made in Indiana, or to the Indianan with whom it contracted. As noted in *Shaffer*, the seized property was not the subject matter of the litigation (433 U.S. 213) and the "only role played by the property is to provide a basis for bringing the defendant into court" (433 U.S. at 209).

In this regard, *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), is apposite. There a Texan attempted to obtain jurisdiction in Texas over a Mexican corporation by garnishing the corporation's insurer in Texas. The policy was made in Mexico and related to activities in Mexico. All of plaintiff's pertinent activities were in Mexico. This Court rejected plaintiff's in rem jurisdictional claim because Texas had no sufficient contacts with the defendant or the underlying action, noting that—

> "The fact that Dick's permanent residence was in Texas is without significance. At all times material, he was physically present and acting in Mexico" (281 U.S. 408).

So too in the present case—at all times material, plaintiff was physically present and acting in Indiana. Thus, his later-acquired residence in Minnesota is without significance.

Can it be said that the seized property has some relationship to the litigation? No. The underlying litigation in-

volves the questions of whether or not plaintiff and defendant were negligent, proximate causation and damages. The situation is the same as the second type of quasi in rem action described in *Shaffer* (433 U.S. at 208-209). Defendant's ownership of the Indiana policy and the insurer's presence in Minnesota are conceded; however, plaintiff's cause of action is not related to defendant's rights and duties arising out of ownership of the Indiana policy. The policy's only relationship is, at best, tangential because it provides security in the event plaintiff is successful in the underlying litigation. So too could the seized stock in *Shaffer* be used for that purpose. Defendant's ownership of an insurance policy has no more relationship with plaintiff's negligence claim than Shaffer's ownership of stock with Heitner's shareholder suit.[9]

## III.

### "Hybrid" Jurisdiction: Impact of *Shaffer v. Heitner*

In *Savchuk II*, the Minnesota Court labelled the *Seider* procedure as "hybrid" and stated:

[9]This Court, in *Shaffer*, determined that the seized stock was unrelated to the shareholders suit regardless of the claim that Delaware had an interest in policing its corporations, controlling the activities of officers and directors of its corporations, and of having its law applied in respect to such matters. For some reason, the Minnesota Court in *Savchuk II* believed that *Seider v. Roth* jurisdiction differed from the attachment procedure used in Delaware because the latter procedure could not "guarantee" jurisdiction over all defendants (A. 56; 272 N.W.2d 891). The Minnesota Court neglected to note that in many *Seider* situations, significant parties are not sued simply because their insurers do not do business in the forum state with the result that total liability may be placed on a defendant whose conduct played only a minor part in the tort.



> "In the accident litigation, however, it [the insurance policy] is inevitably the focus, determining the rights and obligation of the insurer, the insured and practically speaking, the victim." (A. 59; 272 N.W. 892).

This statement, plus the accompanying references to *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 192 (1978), and *Minichieilo v. Rosenberg*, 410 F.2d 217 (2d Cir. 1968), (see A. 59; 272 N.W.2d 892, n. 6), require a brief discussion of the so-called hybrid or sui genius nature of *Seider*.

As previously noted, the *Minichiello* and *O'Connor* courts reasoned, in effect, that the insurer was the real defendant because the real defendant had no real interest in the litigation. While this might be true in the limited fender-bender situation, it is far from correct in a vast number of cases.[10]

The *Seider* cases discussed above range from negligence cases to professional malpractice cases, construction cases, products liability cases, etc. And while these cases generally involve some sort of claimed personal injury, it must be recognized that *Seider* procedure is equally available in respect to claims for economic losses arising out of alleged lawyers', architects', engineers', accountants', bankers', officers', and directors' malpractice—to name a few. Indeed, as this Court surely recognizes, since insurance may be obtained to cover almost every aspect of the entire spectrum of human activity, the *Seider* procedure is virtually boundless. Thus, the *Minichiello*, *O'Connor* and *Savchuk* courts' characterizations of the status of the defendant and his insurer must be examined accordingly.

In many of the above situations, much more than money is involved. In professional malpractice and products li-

[10]Even in automobile litigation, defendants often have a personal, *human* interest in having (what they believe to be) justice done. They resent the allegations against them and understandably desire that they be determined not to be at fault.

ability cases, for example, the integrity of the insured person or product is deeply involved. The insured has a substantial personal interest in seeing that he or his product is vindicated. The defendant is much more than a mere witness who has no more interest in the litigation than a "casual ejector"! And, in respect to products liability litigation, the spectre of a *Seider* judgment being given collateral estoppel effect in subsequent litigation by other claimants remains very real. In this regard, many commercial and professional liability policies forbid settlement without the insured's consent. In all types of litigation, the policy often does not provide for adequate compensation to an insured who must leave his family and employment, journey far from home, and perhaps spend many days attending the trial.[11] In all types of litigation, an adverse verdict may affect the insured's premium status (e.g., rated insurance) or even his ability to secure insurance in the future. In all types of litigation, liability witnesses reside in the *locus delicti* and the testimony of those witnesses is unavailable elsewhere except by the cumbersome, unimpressive deposition procedure. In many types of litigation, it is desirable to have a view of the accident scene, and to have jurors drawn from the accident area. In all types of litigation, the defendant may be required to relitigate the same matter from beginning to end in an in personam action in the *locus delicti*. In the commercial areas, it is not uncustomary for the policy to provide that the insured will conduct his own defense—and often these policies contain substantial deductibles wherein

[11]The use of depositions usually is no substitute for available live testimony. Juries draw incorrect conclusions from the absence of parties. The defendant (and his insurer) are entitled to have the jury see and hear him—face to face—in order to properly judge his veracity, candor, etc.



the insured is, in effect, self-insured for the first "layer" of his possible liability.[12] Additionally the defendant may be deprived of his right to join or implead essential parties because their insurers do not do business in the forum state—a situation seldom encountered in the state where the cause of action accrued because of the prevalence of long-arm statutes.

Thus, in the vast majority of litigation as to which insurance is applicable, the defendant is a very real defendant—he is no mere witness who has no more interest than Judge Friendly's strawman. As this Court noted in *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907), the right to participate in one's own defense—

> ". . . is the right conservative of all other rights and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizen of all other states. . . ."

Finally, the Minnesota and New York courts have announced that, in *Seider* quasi in rem cases, they will apply the *lex fori* rather than the law of the place where the cause of action accrued. This declaration compounds the unconstitutionality of *Seider* by often depriving the defendant (and his insurer) of substantive due process by transmuting nontortious conduct into a tort, by depriving the defendant of defenses otherwise available, by tolling applicable statutes of limitations, and so on and on. For example, suppose a product is not defective or a physician's conduct does not constitute malpractice pursuant to the law of the accident state; but the product may be found

[12]Apparently no one yet has considered the impossible constitutional effect of a *Seider* seizure of this kind of policy.

defective, or the conduct, malpractice, in a *Seider* state. In this situation, a defendant who is jerked from his home state to a far away jurisdiction may find himself saddled with an obligation which he did not owe in his home state.

In the present case, plaintiff and defendant, both Indianans, engaged in a course of conduct in Indiana which was in every respect controlled by Indiana law. Now, because of *Seider*, defendant is compelled to defend himself far from home, shorn of the protection of the Indiana guest statute (an absolute defense) and the Indiana statute of limitation. In addition, he must defend himself pursuant to the Minnesota comparative negligence law rather than the Indiana contributory negligence law. Not only is he subjected to a new jurisdiction—he is subjected to a whole new body of law which was entirely inapplicable to him before plaintiff started his *Seider* action in Minnesota. (See A. 58; 272 N.W. 891, n. 5)

So too in *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194 (2d Cir. 1978). There plaintiff's decedent was killed in a Virginia construction accident. Pursuant to Virginia law, plaintiff's sole remedies were provided by the Virginia workmen's compensation statute. However, the Court of Appeals, after determining that the case was constitutionally "Seidered" into New York, held that, pursuant to New York law, plaintiff was entitled to prosecute a wrongful death action against the defendants. (See 579 F.2d 202-206).

Thus, once the constitutional nexus is assumed to be the relationship among the plaintiff, the forum and the insurer (instead of the relationship among the defendant, the forum and the litigation), the result is that the forum state will then unconstitutionally ignore the interests of the accident or occurrence state to establish the legal rights and



obligations of the accident state's residents, and it will deprive those residents (and their insurers) of the protection of the law of their home state pursuant to which they have conducted their affairs. This result is unconstitutional because of its gross unfairness to the "defending parties"—it is a wholly unreasonable application of local law which violates the standards mandated by our federal system. See *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). Minnesota does not have the right to impinge the rights of the State of Indiana and its residents in this manner.

## IV.

## CONCLUSION

In *Shaffer v. Heitner*, this Court, in the clearest terms, mandated that—

> "We therefore conclude that *all assertions of state-court jurisdiction* must be evaluated according to the standards set forth in International Shoe and its progeny." (433 U.S. at 212; emphasis supplied).

Minnesota and New York have chosen to ignore the word "all" in the foregoing declaration and have created what they chose to term a hybrid or sui generis kind of jurisdiction which is somehow to be immune from the *International Shoe* standards. They have focused on the residency of the plaintiff, the forum, and the fortuitous presence of an insurer within the forum as establishing a permissible jurisdictional basis. They have totally ignored the relationship of the defendant, of his insurer, and of the litigation to the forum.

There is no doubt that the jurisdictional basis utilized

by *Seider v. Roth* and *Savchuk I* is invalid pursuant to *Shaffer*. That basis cannot be transmuted into a valid basis by applying to the self-same procedure appellations such as hybrid or sui generis. If it's invalid, it's invalid.

Since, in the instant case, there are absolutely no contacts between the forum on one hand and the defendant and the litigation on the other, it follows that Minnesota's use of a quasi in rem procedure to acquire jurisdiction constitutes a violation of the Due Process Clause and the decision of the Minnesota Court should be overruled.

Respectfully submitted,

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